United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21539
(Cr. No. 540-67)

LEROY PAYTON

Appellant

vs.

UNITED STATES OF AMERICA

Appellee

Appeal from the United States District Court
for the District of Columbia

THOMAS M. O'MALLEY

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Attorney for Appellant

Appointed by this Court

STATEMENT OF QUESTIONS PRESENTED

In the opinion of the Appellant, the following questions are presented:

1. Whether it was error for the Court to fail, sua sponte, to grant a motion for a mistrial when evidence of other crimes were introduced and an objection was made on behalf of the Appellant.

2. Whether it was error for the Court to deny a motion to suppress evidence resulting from an arrest made without probable cause to believe that a crime had been committed or that the Appellant was a participant in that crime.

3. Whether it was error for the Court to instruct on the presumption of recently stolen property when there was no evidence in the record establishing possession on the part of the Appellant or that certain items allegedly in his possession were in fact "stolen".

4. Whether it was error for the Court to refuse to instruct on the lesser included offense of "petit larceny" in the presence of competent evidence indicating that the value of the subject larceny was in fact less than One Hundred Dollars.

5. Whether it was error for the Court to fail to instruct as an essential element of larceny, the intent to permanently deprive the owner of the subject of the larceny.

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No. 21539

LEROY PAYTON

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Appeal from the United States District Court
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction of the crime of "Grand Larceny" 22 D.C. Code 2201. The Appellant was found guilty by a jury on October 20, 1967; and on December 7, 1967 he was sentenced to incarceration for a period of eighteen (18) months to fifty-four (54) months. This Court has jurisdiction under the provisions of the Act of June 25, 1948, 62 Stat. 929, U.S.C. Title 28, Section 1291. The Appellant is presently incarcerated, petition for bond pending appeal having been denied in both the lower court and this court.

STATEMENT OF CASE

Appellant was tried in the District Court upon an indictment charging him and a co-defendant with the crime of "Grand Larceny". The events as shown at the trial are alleged to have occurred on February 23, 1967 at about 2:30 p.m. in the Seventeen Hundred Block of DeSales Street, Northwest, Washington, D.C.

Prior to trial appellant made a motion for suppression of evidence which motion was heard and denied.

During the course of the trial counsel renewed the motion to supress and evidence was introduced in camera and said motion was denied. (Tr. 91).

At the conclusion of all of the Government's evidence a motion for judgment of acquittal was made by the Appellant and denied (Tr. 125).

Appellant's counsel at the conclusion of the Court's instruction requested an instruction on the lesser included offense of "petit larceny" and said motion was denied (Tr. 173).

Jury returned a verdict of "guilty as charged" (Tr. 179), and the Court sentenced Appellant to serve a period of eighteen (18) months to fifty-four (54) months.

A truck owned and operated by Washington Deliveries, Inc. and driven by one Alfred Thomas was parked in the Seventeen Hundred Block of DeSales Street, N.W., Washington, D.C. while the driver made a delivery at 1725 DeSales Street. When he left his truck he had locked the rear of the truck

containing certain new merchandise which he was in the process of delivering for certain downtown stores. In a short time he returned to his truck and found that the lock and chain had been cut and certain items taken therefrom (Tr. 43-45).

He was able to describe in generalities what was on his truck that day and that he saw Government Exhibits 3 and 4 in the possession of the police on February 23, 1967 (Tr. 50).

Warren Kenny, an employee of Mayflower Garage was in the vicinity of the "truck" and an "old Buick" and saw most of what transpired; did not communicate his information to the arresting police until after the arrest of the Appellant and was asked to only "generally" identify the Government exhibits (Tr. 65).

Mr. Mays, the manager of Washington Deliveries responded to the Police Precinct, went over the items and checked the complete load against the manifest and the ones that were not on the truck were missing (Tr. 38).

Officers Ford and Buck, members of the Metropolitan Police Department, assigned to a squad described colloquially as the "bum squad" were driving on Seventeenth Street when their attention was attracted to an old Buick with an outdated inspection sticker. They made a "U" turn on Seventeenth Street and then pulled in behind the "buick" (Tr. 107).

Officer Ford saw an unidentified male walk east on DeSales Street with clothing and he saw the Appellant walk West on DeSales Street with what appeared to be clothing from the "buick" car. He saw "wire cutters" and other clothing in the Buick car and told his partner, Officer Buck "Hey Ed, go down there and follow that guy. And I hollered down to him to bring him back because he caught up with him." (Tr. 76) At this time Officer Ford had no specific information about some sort of a theft having taken place at DeSales Street and had no specific information to look for any particular individuals with certain description (Tr. 81). Officer Ford did not arrest the Appellant, Officer Buck did (Tr. 82).

Officer Ford identified Exhibits 3 and 4 as some of the clothes taken from the Appellant and from the Buick car and "taken from the crime" (Tr. 102).

Officer Buck testified that he arrested the Appellant after some conversation with his partner (Tr. 108). This Officer identified Exhibits 3 and 4 as "part of the clothing that was recovered on the scene" (Tr. 110).

In the presence of the jury Officer Ford testified "In this instance at the time Officer Buck and I were assigned to, I think the area was from 15th to around 13th and I think it was from Eye Street, to M, for these larcenies from trucks that we were having, one or two a day, where they were cutting locks on these delivery trucks." An objection was entered by the Appellant and sustained

by the Court (Tr. 73) but nothing further was done.

The Court instructed on the presumption of recently stolen property though the record is silent as regards what the Appellant actually possessed or that the items he may have possessed were stolen. And the Court in instructing on "larceny" failed to instruct that an essential element of the intent was for the Appellant to intend to permanently deprive the owner of his property.

STATUTES INVOLVED

22 D.C. Code 2201:

GRAND LARCENY:

> "Whoever shall feloniously take and carry away anything of value of the amount of value of $100 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years."

SUMMARY OF ARGUMENT

I

The Court erred in failing to grant a "mistrial" sua sponte when evidence of other crimes were introduced and an objection was made on Appellant's behalf and sustained by the Court.

II

The Court erred in failing to grant motion to suppress evidence obtained as a result of an unlawful arrest.

III

The Court erroneously instructed on the presumption

of recently stolen property when no evidence was introduced as having been in the possession of the Appellant.

IV

The Court erroneously refused to instruct on lesser included offense of "petit larceny".

V

The Court erroneously instructed on the elements of "larceny".

ARGUMENT

I

The Court erred in failing to grant a "mistrial" sua sponte when evidence of other crimes were introduced and an objection was made on Appellant's behalf and sustained by the Court.

The Appellant was charged in a one count Indictment with the crime of "Grand Larceny" on or about February 23, 1967. The facts introduced tended to prove that a single truck on that date was broken into and certain items taken therefrom. The modus operandi was for the theives to cut the locks of chains of delivery trucks with wire snippers and such an instrument was alleged to have been used in the instant case. The locus of the instant crime was on DeSales Street which is located between 16th and 17th Streets, and between L and M Streets, N.W., Washington, D.C.

Given this fact situation in the instant case Officer Ford, in the presence of the jury, testified as follows: ". . . .In this instance at the time Officer Buck and I

were assigned to, I think the area was from 15th to around 18th and I think it was from Eye Street to M for these larcenies from trucks that we were having, one or two a day, where they were cutting locks on these delivery trucks."

The only logical inference permitted by Officer Ford's narrative is that the Appellant and his cohorts were responsible for all of the larcenies which Officer Ford suggested had occurred in the vicinity of the instant larceny.

Appellant's counsel was aware of the prejudicial nature of this evidence and objected and the objection immediately hit a responsive cord in the Court for he quickly sustained (Tr. 73).

It should have been equally apparent to the Court that no curative instruction could have eliminated the prejudice caused to the Appellant's defense by the witness' testimony and this may explain why no effort was made by the Court. The only possible cure for the prejudicial testimony offered was to accord the Appellant a mistrial and it was "plain error" for the Court not to have done so. Martin v. United States, 111 Ap. D.C. 96, 127 F. 2d 865 (1942), involved a police officer charged with assault and the Government introduced evidence of other assaults that same night by this officer on this officer's beat.

> "Appellant also alleged as error the failure to declare a mistrial when different witnesses made hearsay statements carrying the inference that appellant committed other offenses on Labor Day evening. If an admonition to the

> jury will negative the harm done, the harm was corrected in this case, for the trial judge did the best that could be done. In view of the fact that the case is to be reversed anyway, it is unnecessary for us to consider whether the impression of the hearsay might have remained, and with other factors, could have prevented the defendant from having a fair trial."

In a minority concurring opinion by Stephens, J., said:

> "As well settled as the rule that, with the exceptions noted, evidence of other crimes is not admissible to prove the one charged, is the requirement that, when evidence of other crimes is admitted within any of the exceptions, the jury, in some jurisdictions upon proper request, in others upon the court's own motion, must be cautioned by the trial judge through an instruction telling them that the evidence of other crimes has been admitted for the purpose only for which it is properly admissible and that it must be considered for no other."

Drew v. United States, 331 F.2d 85 (1964)

> "It is a principle of long standing in our law that evidence of one crime is admissible to prove disposition to commit crime, from which the jury may infer that the defendant committed the crime charged. Since the likelihood that juries will make such an improper inference is high, courts presume prejudice and exclude evidence of other crimes unless that evidence can be admitted for some substantial, legitimate purpose."

ARGUMENT II

The evidence introduced by the Government was result of a search subsequent to an unlawful arrest and should have been suppressed.

Officer Buck arrested the Appellant after a conversation with Officer Ford (Tr. 100) but Officer Buck's testimony did not indicate that such a conversation ever took place. Officer Ford was quite emphatic in stating he did not arrest Appellant (Tr. 82). Officer Buck had no information upon which to predicate an arrest in that he had no knowledge of a crime having been committed nor that the Appellant was in any way involved in a crime.

Assuming arguendo that Officer Buck could rely upon all of the information in the mind of Officer Ford there was still not probable cause, for as Officer Ford testified he "had no specific information about some sort of a theft having taken place at DeSales Street....and no specific information to look for any particular individuals with certain description" (Tr.81).

White v. United States, 271 F 2d. 829,106 U. S. App. D.C.246:

> "The officer had no warrant of any kind and no probable cause to accost Appellant, require him to place his hands in a certain position, and frisk him.....There had been no outcry or report of a felony and appellant committed no misdemeanor in the officer's presence. To require appellant to disrobe, and thereupon to search his clothes and person, was an unreasonable and unlawful violation of his rights as a citizen."

"Had he remained standing where he was first accosted, or had he merely refused to talk, the police would have lacked probable cause either to arrest or to search him. The officers would have had no justifiable reason to lay hands upon him." Green v. United States 259 F 2d. 180, 104 U.S. App. D. C. 23.

This court in Gatlin v. United States, 326 F 2d. 666, 117 U. S. App. D. C. 123 determined the arrest lacked probable cause even though the police had the report of a robbery and the defendant generally fit a description and was found in the vicinity of the crime. In the instant case there was no report of a crime of any kind.

With such a deapth of information the officers throughout their testimony relied upon an "expired inspection sticker" and this appeared to be of great persuasive force to the trial judge who in the middle of the co-defendant's argument on the motion to suppress asked: "Why don't you mention the inspection sticker?"

In the context of this particular arrest the "expired sticker" had absolutely no relevency and was intended and used only as a ruse for the arrest; and appears to have been persuasive with the Trial Court.

These officers at the time of the arrest were "dressed casually" in "tan khaki pants" (Tr. 72); were driving in a "1964 Volvo" (Tr. 73) made a "U" turn on 17th Street when they saw the expired sticker and pulled in "behind

their car" (Tr. 107) when their car apparently was headed East on DeSales Street which is one way East and yet the officers car appears to have been going west.

This Court has had occasion in the past to review arrests for felonies predicated upon arrests for traffic violations but it is suggested in this context that it is extremely doubtful that either of the arresting officers on the "bum squad" dressed as they were, driving in a "Volvo" even had a book of traffic tickets in their possession or had any interest in minor traffic violations.

It is therefore respectfully suggested that the "expired sticker" had no relevency to the arrest in this case and that without it there was not probable cause to arrest. Even assuming the validity of the "sticker" charge the arrest could only effect the driver and not the appellant.

ARGUMENT III

The Court erroneously instructed on the presumption of recently stolen property when no evidence was introduced as having been in the possession of the Appellant.

This instruction had to be predicated upon what the Appellant allegedly took from the Buick automobile but there is no evidence in the record connecting this Appellant with Government Exhibits 3 and 4; or that Exhibits 3 and 4 were in fact stolen.

Officer Buck arrested the Appellant and we would

infer took certain items from him; but at the trial he identified Exhibits 3 and 4 as items "recovered at the scene" (Tr. 110); not that they were taken from this Appellant. "The scene" could have been the truck, the buick car, the street or the Appellant or the co-defendant.

Officer Ford when asked to identify Exhibit 3 said: ". . . .These were some of the clothes that we took from the automobile and took from Mr. Payton, I don't know if the other clothing has been released. There was more than that though." And when asked about Exhibit 4: "Yes, sir. These are more of the clothes that was taken from the scene." The scene is too equivocal to afford the presumption afforded by recently stolen property.

But assuming arguendo it had the requisite definitiveness for possession there is no evidence in the record that Exhibits 3 and 4 had been stolen.

The driver, Mr. Thomas, was the only person who really knew which of the items on his truck he had delivered or dispensed with in some other way. He identified Exhibits 3 and 4 as having been in the possession of the police at No. 3 precinct (Tr. 48). Neither police officer had testified that he had shown such exhibits to Mr. Thomas or whether such a police officer got those items from the truck, the buick car, the Appellant or the co-defendant or some other place. If the items shown

this witness had come to him through a person other than the appellant or the co-defendant, or from the truck there would of course be no "stolen goods."

Mr.Mays, the manager of Washington Deliveries, Inc. at the precinct, found five items to be missing by checking "the complete load against the manifest and the ones that weren't on the truck at that time were missing" (Tr. 38). For such a conclusion to be valid we must assume that the driver followed a pre-ordained route, that he checked each delivery as it was made, and that no item had been removed from the truck from the time it left DeSales Street until such time as he inspected the truck at the precinct.

It is respectfully suggested that too many assumptions are required to establish a fact which is to be used as a vehicle for a legal presumption in a case which must be proved beyond a reasonable doubt..

It is therefore the contention of the Appellant that the Appellee established neither that the Appellant had possession of Government Exhibits 3 and 4; nor that said exhibits were stolen goods, and it was error for the Court to give the instruction on "possession of recently stolen property".

ARGUMENT IV

The Court erroneously refused instruction on the lesser included offense of "petit larceny".

Appellant's counsel requested the Court to instruct on the lesser included offense of "petit larceny" and the request was denied (Tr. 173).

Mr. Mays said five items were missing. We don't know from the record which items the Appellant is supposed to have had in his possession, but we do know there was testimony that Exhibit 4 was two suits, one valued at $54.50 and the other $45.66 and exhibit 3 was valued at $41.42, for a total of $141.58. Exhibit 4's combined total was $100.16 (Tr. 115 and 119). The Indictment charged a value of $445.00.

On cross examination Mr. Berryman testifying with regards to Exhibit 4 admitted the prices he gave were "cost" prices and there was a big difference between "cost" and "value" (Tr. 115).

Mr. Slate testified to the value of Exhibit 3 from the price tag that was in the label. The Court seemed to think that since records to which the label was compared were kept in the "usual course of business" that they were admissable as to value (Tr. 120).

Mary B. Riley v. United States, (1955) 225 F.2d 558; 99 Ap.D.C. 144

> "Even where, as here, the expression of opinion by an expert on a hypothetical question closely touches the ultimate

> issue which the jury must determine, it is admissible so long as it relates to matters within the witness' special competence and skill and not to matters of common knowledge and observation."

The Court further complicated the "value" question with the following erroneous equivocal instruction: "On or about February 23, 1967, within the District of Columbia, that the defendant Dixon and the defendant Payton stole property in the possession of Washington Deliveries, Inc., a body corporate--which has been stipulated to--of the value of about $445.00, consisting of clothing of the value of about $445.00."

The underlined phrase could as reasonably have been inferred to have described the "value" as it could the "body corporate".

It is therefore the Appellant's contention that the Court erred in the instruction it gave and also erred in refusing to give the requested instruction on the lesser included offense of petit larceny.

In Larson v. United States (10th Cir. 1961), 78 U.S. App. D.C. 12, 136 F.2d 766 the defendant was convicted of grand larceny after he had asked for an instruction on petit larceny and it was refused. The court said:

> "In any event, we are convinced that where, as here, there is proof to support a lesser offense necessarily included in the offense charged, and the defendant timely requests that such lesser offense be submitted to the jury, the failure to do so withdraws from the jury a measure

> of defense to which the defendant is entitled and constitutes reversible error. See Berra v. U.S., 351 U.S. 131, 76 S. Ct. 685, 100 L. Ed. 1013; Stevenson v. U.S., 162 U.S. 313, 16 S. Ct. 839, 40 L. Ed. 980."

From the trial record one might infer that the court considered the evidence of Grand Larceny to be strong, but the court's impression should not deprive appellant of a defense available to him.

> "The evidence might appear to the court to be simply overwhelming to show that the killing was in fact murder, and not manslaughter or an act performed in self defense, and yet, so long as there was some evidence relevant to the issue of manslaughter, the credibility and force of such evidence must be for the jury and cannot be a matter of law for the decision of the court." Stevenson v. United States, 162 U.S. 313 (1896).

This Court discussed the law on lesser included offenses in the case of Younger v. United States (March 24, 1959), 263 F.2d 735, 105 U.S. App. D.C. 51:

> "In Rutkowski v. United States, 6 Cir. 1945, 149 F.2d 481, 482, the court cited Lamore, and used the following language: 'Under the statute involved here, to sustain the robbery charge, evidence of forcible taking or a taking by putting the individual robbed in fear, is essential, while to sustain the charge of felonious taking only the elements of ordinary larceny need be proved. Other and additional proof than that needed for larceny is required to establish the crime of robbery, but there can be no robbery without larceny, for robbery includes larceny. . . Lamore v. United States, 78 U.S. App. D.C. 12, 136 F.2d 766. Robbery is in fact larceny committed by violence, and includes stealing and asportation as well as assault. Bertsch v. Snook, 5 Cir., 36 F.2d 155; Costner v. United States, 139 F.2d 429.'

> "The proper procedure was followed by the trial court in the case before us in instructing the jury that, if they found that the defendant was not guilty on the count charged,they should then consider the lesser included offense."

In the case of Graves v. United States (April 18, 1963), 318 F.2d 265, 115 U.S. App. D.C. 294, the Government admitted on appeal that the jury should have been instructed on the lesser included offense of petit larceny; but the interesting part of that case as it relates to the instant case is the dissenting opinion of Judge Burger wherein he said:

> "Careful examination of the record satisfies me that there was no evidence introduced on larceny which would permit, let alone require, an instruction on that lesser included offense. I agree with the District Judge's view of the evidence that the jury was compelled either to find appellant guilty of robbery or to acquit him. Unless the evidence in a new trial varies from the record now before us the situation will be the same, as I see it. It should be noted that when counsel for the defense requested the larceny instruction and the District Judge asked what evidence in the case required the instruction, defense counsel did not point to any such evidence and did not object to the instruction as ultimately given."

In the instant case there was both a theory advanced and a request for the instruction.

ARGUMENT V

The Court gave an erroneous instruction on the elements of "larceny".

The Court in it's instruction on "larceny" neither used the phrase "felonious taking" nor "with the intent to permanently deprive the owner of possession."

The Court did instruct as follows:

"First, that the defendant or the defendants unlawfully took property of the Washington Deliveries, Inc.; and second, that the property taken was of the value of a hundred dollars or more; third, that the taking of the property was accompanied by the intent to steal it; and fourth, that the defendant intended to convert the property to his own use.(Tr. 168)..

Levin v. U.S. 338 F.2d 265 (1964) 124 Ap. D.C. 158

> "As indicated by the statute, the gist of the crime is the felonious taking and carrying away of anything of value and, under the terms of our statute, as distinguished from those of certain other jurisdictions, the ownership of the property does not matter."

Hunt v. U.S. 316 F.2d 652 (1963) 124 Ap. D.C. 310

> "In our judgment, there is substantial evidence from which a jury may conclude beyond a reasonable doubt that Hunt and his co-defendant, acting in concert, came into possession of Mrs Ali's wallet, knowing it was her wallet and intending permanently to dispossess her of it together with the money contained therein."

WHEREFORE, for the foregoing reasons it is respectfully submitted that the Judgment entered herein should be reversed.

Thomas M. O'Malley
Attorney for Appellant

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,539

LEROY PAYTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
CHARLES A. MAYS,
CARL S. RAUH,
Assistant United States Attorneys.

Cr. No. 540-67

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

(1) Did the police have probable cause to arrest appellant, where (a) the police learned that appellant had just broken into a delivery truck and (b) the police observed appellant walking away from the area of the crime carrying several clothing-filled bags?

(2) Did the trial court commit plain error in failing to *sua sponte* grant a mistrial when Officer Ford explained that the reason he and his partner were patrolling in a private car and dressed in casual clothes was because they were assigned to the tactical force to stop "these larcenies . . . one or two a day . . . [involving] cutting locks on these delivery trucks"?

(3) Did the trial court commit plain error (a) in instructing the jury on the inference from recently stolen property, (b) in the way it read the indictment to the jury and (c) in charging the jury that the larcenous intent of the taker must be "to appropriate the stolen property to his own use inconsistent with the property rights of the person from whom it is taken"? And did the trial court commit reversible error in refusing to give a lesser included offense instruction on petit larceny where there was no evidence to indicate a value of less than $100?

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TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,539

LEROY PAYTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Leroy Payton and Lewis Dixon were jointly charged with grand larceny in violation of 22 D.C. CODE § 2201 (1967). After trial before a jury and Judge Walsh on October 18, 19 and 20, 1967, the jury returned a verdict of guilty as to both Payton and Dixon. Only Payton, who was sentenced to imprisonment for 18 to 54 months, has appealed.

Motion to Suppress Hearing

Prior to trial, Appellant Payton filed a written motion to suppress the men's clothing found in his possession at

the time of his arrest.[1] An evidentiary hearing on appellant's motion to suppress was held on August 14, 1967 before Chief Judge Curran (Mot. Tr. 1).[2] Officer John Ford and Appellant Payton testified at the hearing. Officer Ford's testimony showed that on February 23, 1967, Officers John Ford and Edward Buck, Third Precinct Tactical Force, Metropolitan Police Department, were patrolling in a private vehicle "the area east of Connecticut Avenue to 15th Street, Northwest, north of K Street to M Street, Northwest" [3] in order to stop the numerous daytime larcenies from delivery trucks that had been occurring in this area (Mot. Tr. 3-4, 7). At approximately 2:30 p.m. on February 23, 1967, Officers Ford and Buck were driving north on 17th Street, Northwest, when they observed a 1957 black Buick with an expired inspection sticker stalled at 17th and De Sales Streets, Northwest (Mot. Tr. 4-5). Officer Ford observed three Negro males by the Buick;[4] he also noticed that the Buick's radiator was leaking water (Mot. Tr. 5, 8, 11).

Officer Ford, who was driving, made a U-turn, and while doing so, observed one of the three men go into the back seat of the Buick, remove some clothing-filled, cleaning-type bags and proceed to walk north on 17th Street with the bags (Mot. Tr. 6; P.H. Tr. 8). The other two men, Payton and Dixon, were pushing the Buick south on 17th Street (Mot. Tr. 6, 7, 10; P.H. Tr. 9). After making the U-turn, Officer Ford pulled his vehicle in behind the Buick and parked (Mot. Tr. 6; P.H. Tr. 9). Both officers got out; Officer Ford walked over to Dixon who was sitting in the driver's seat of the Buick; Officer Buck

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[1] Dixon did not make a pre-trial motion to suppress.

[2] The transcript of the motion to suppress hearing before Chief Judge Curran on August 14, 1967 will be referred to as "Mot. Tr." The transcript of the preliminary hearing before General Sessions Judge Scalley on March 9, 1967 will be referred to as "P.H. Tr." The transcript of the trial before Judge Walsh on October 18, 19 and 20, 1967 will be referred to as "Tr."

[3] There are approximately seven city blocks within this area.

[4] At trial, Officer Ford testified that these men "were sort of shabbily dressed" (Tr. 75).

followed Payton who had removed an armful of clothing-filled brown bags from the back seat of the Buick and headed south on 17th Street (Mot. Tr. 6, 7, 10; P.H. Tr. 9). As Officer Ford approached the driver's side of the Buick, he observed in plain view in the back seat of the Buick more clothing-filled brown bags and a bolt cutter (Mot. Tr. 6-7; P.H. Tr. 9). Officer Ford was aware that there had been about ten recent daytime larcenies from trucks where a bolt cutter had been used to break into the trucks (Mot. Tr. 7).

Officer Buck, who was following Payton, was about 30 or 40 feet south of the Buick when Officer Ford spotted the bolt cutter in plain view in the back seat of the Buick (Mot. Tr. 9). At this time, Officer Ford hollered down the street to Officer Buck to detain Payton and talk to him; Officer Buck brought Payton back to the Buick; Payton was not under arrest (Mot. Tr. 9, 10; P.H. Tr. 9).[5] At this time, several scout cars pulled up and Officers Ford and Buck were informed that there had been a radio run for "three Negro males in a Buick [the tag number was given]" who "were observed breaking into a D.C. delivery truck" (Mot. Tr. 9).[6] At this time, Officer

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[5] The transcript of the testimony given at the preliminary hearing before General Sessions Judge Scalley on March 9, 1967 was before Chief Judge Curran at this motion to suppress hearing (Mot. Tr. 7-8, 9-10).

[6] Warren Kenny observed the theft and immediately called the police (P.H. Tr. 4). Kenny's call to the police was the basis of the radio run. After Kenny made the call, he walked down to the corner of 17th and De Sales Streets and spoke to Officer Ford (Tr. 82; P.H. 4). The conversation between Warren Kenny and Officer Ford took place before either Payton or Dixon had been placed under arrest (Tr. 82). At a motion to suppress hearing held during trial, Officer Ford testified as follows:

> By the time, Your Honor, that my partner had gotten Mr. Payton to come up to the car with him, Mr. Kenny said to me, he says—and I knew Mr. Kenny from being in the precinct so long—I think he's been there around 29 years—he said, "How did you get here so fast?" He said, "They just broke into that truck on DeSales Street." And that's whenever I told this man he was under arrest. You see, I didn't arrest Payton. I arrested Dixon. I told him, I said, "You're under arrest for larceny." (Tr. 82.)

Buck placed Payton under arrest and Officer Ford placed Dixon under arrest (P.H. Tr. 10).[7] Both Payton and Dixon were informed that they were under arrest for grand larceny and advised of their constitutional rights (P.H. Tr. 10).

Appellant Payton testified that at approximately 2:30 p.m. on February 23, 1967 he was walking south on 17th Street away from the Buick (Mot. Tr. 12-13). He further testified as follows:

> I had a couple bags on my arm and a fellow came up behind me and asked me where I was going. So I asked him why he asked me that. So he told me that he was a police officer and asked me to go back to the car where I took the paper bags out of. So I went back to the car. He told me to put the bags back into the car. (Mot. Tr. 13.)

At the conclusion of the testimony, the motion to suppress was denied (Mot. Tr. 18).[8]

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[7] That the arrest of Payton and Dixon took place after Officers Ford and Buck had received information from the officers in the scout cars and from Mr. Kenny is supported by Officer Ford's testimony at the preliminary hearing:

> * * * Mr. Payton . . . went in the back seat of the car and also grabbed an armful of clothes in these brown bags and proceeded south on Seventeenth Street. At this time my partner and I pulled right in behind their vehicle and my partner started walking down the street behind Mr. Payton, and I walked up to the driver's side of the Buick with Mr. Dixon there. And I observed in the back seat of the car a bolt cutter and some more men's clothing in these brown paper bags. At this time I called down to my partner to detain this man, that evidently these things were stolen. At this time—well, my partner brought Mr. Payton back up to the car. At this time two scout cars pulled up and they said that they received a radio run for three Negro males in a Buick who just stole some clothes out of a delivery truck in the 1700 block of DeSales Street. And at this time we placed them under arrest and advised them of their rights and charged them with grand larceny." (P.H. Tr. 9-10.)

[8] During trial, Payton renewed his motion to suppress the men's clothing seized as a result of his arrest. Dixon joined in the motion (Tr. 76-78.) After testimony was taken, the trial judge denied this motion to suppress (Tr. 76-91).

The Trial

The Government's evidence at trial showed that on the morning of February 23, 1967, Alfred Thomas, a truck driver for Washington Deliveries, Inc., which was stipulated to be a corporation doing business in the District of Columbia,[9] set out in his delivery truck to deliver merchandise (Tr. 33, 41, 42-43). Thomas, who loaded his own truck, made sure that all the items listed on his manifest or route sheet (Government Exhibit 1) were loaded on the truck (Tr. 33-34, 45-46, 54-55). Included in the merchandise loaded on Thomas' truck was one suit from Bruce Hunt (Government Exhibit 3) which was to be delivered to Marcus Ring at 1801 Eye Street, Northwest, and two suits from Raleigh Haberdasher (Government Exhibit 4) which were to be delivered to George Steinman at 839 17th Street, Northwest (Tr. 36-37, 49-50).

At approximately 2:30 p.m. in the afternoon of February 23, 1967, Thomas parked his truck on the south side of the 1700 block of De Sales Street, Northwest, in order to make a delivery at 1725 De Sales Street (Tr. 43-44, 58-59). After taking some merchandise out of his truck, Thomas locked the remaining merchandise in the back of his truck with a padlock (Government Exhibit 2) (Tr. 43-45). Thomas, with the merchandise, then went inside 1725 De Sales Street followed by Dixon (Tr. 54, 55). When Thomas got on an elevator to go to an upper floor, Dixon turned around and walked away (Tr. 43, 55).

While Thomas was delivering merchandise in 1725 De Sales Street, Warren Kenny, an assistant manager of the Mayflower Garage at 1711 De Sales Street, noticed on the south side of De Sales Street Thomas' truck and an old black Buick which was parked behind the truck (Tr. 57-60, 68). Kenny observed Payton and Dixon sitting in the Buick; a third man was unloading some clothing-filled

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[9] The business of Washington Deliveries, Inc. was the delivery of purchased goods to the customers of 110 Washington stores (Tr. 33).

bags from the truck and placing them in the back seat of the Buick (Tr. 59-62, 67). Seeing this, Kenny went into the cashier's office of the garage and wrote down the Buick's tag number on a discarded parking lot ticket (Government Exhibit 5); Kenny then called the police (Tr. 62-63, 68-69). After completing his call to the police, Kenny observed the Buick pull out; the Buick went about a half block and stalled at the corner of 17th and De Sales Streets (Tr. 63, 69-70). Kenny then walked down to the corner where the Buick was stalled (Tr. 63, 69).

At this time, Officers Ford and Buck who were driving north on 17th Street observed the black Buick (with an expired inspection sticker) stalled at the corner of 17th and De Sales Streets (Tr. 72-74, 100, 104-05). Both officers, who were dressed casually, having been detailed to the tactical force, were assigned to this crime area to stop "these larcenies . . . one or two a day . . . [involving] cutting locks on these delivery trucks" (Tr. 72-73, 105). Officer Ford, who was driving his private car, made a U-turn, and while doing so, he observed a man go into the back seat of the Buick, remove some clothing-filled bags and walk north on 17th Street; this man was never arrested and his identity was never determined (Tr. 75, 82-83, 107). Officer Ford observed two other men, Payton and Dixon, pushing the Buick south on 17th Street (Tr. 75-76, 98-99, 106-07). Officer Ford parked his car and both he and Officer Buck walked toward the Buick (Tr. 75). At this time, Payton went into the back seat of the Buick and removed some clothing-filled bags and started walking south on 17th Street with the clothing (Tr. 75-76, 98, 107-08). Officer Buck followed Payton while Officer Ford approached the Buick to speak with Dixon who was sitting in the driver's seat (Tr. 75-76, 98, 107). As Officer Ford approached the Buick, he observed in plain view in the back seat of the Buick more clothing-filled bags and a bolt cutter (Government Exhibit 6) (Tr. 76, 99, 107).

At this time, Officer Ford hollered down to Officer Buck to detain Payton; whereupon, Officer Buck brought Payton back up to the Buick (Tr. 76, 108). Payton and Dixon were placed under arrest shortly thereafter. Seized at this time were the bolt cutter (Government Exhibit 6) and a number of clothing-filled bags including a suit from Bruce Hunt (Government Exhibit 3) and two suits from Raleigh Haberdasher (Government Exhibit 4) (Tr. 99, 102, 109-10). At this time, Alfred Thomas saw in the possession of the police the suits from Bruce Hunt (Government Exhibit 3) and Raleigh Haberdasher (Government Exhibit 4) which had been on his truck (Tr. 47-50). Thomas then gave the police the padlock (Government Exhibit 2) that had been cut during the larceny from the truck (Tr. 51, 109).

Shortly thereafter, Thomas drove his truck to the third precinct station house where it was determined that five items, which had been listed on the manifest and loaded on the truck in the morning and which had not been delivered, were missing (Tr. 37-38, 46-47). Thomas had checked off on the manifest those items that he had delivered; thus, by an inventory of the truck it was determined which of the undelivered items were stolen (Tr. 36-39, 47-50, 56-57).

Gary Slate, the personnel manager at Bruce Hunt, testified that from the manufacturer's invoice (Government Exhibit 8) for the suit sold to Mr. Ring (Government Exhibit 3) he was able to determine that the cost of this suit to Bruce Hunt was $41.42 (Tr. 117-119). Neal Berryman, an assistant comptroller at Raleigh Haberdasher, testified that from certain numbers listed on the sales check (Government Exhibit 7) for the two suits purchased by Mr. Steinman (Government Exhibit 4) he was able to determine that the aggregate cost of these two suits to Raleigh Haberdasher was $100.16 (Tr. 112-15).

After Government Exhibits 1 through 8 had been admitted into evidence, the Government rested (Tr. 36, 114, 120, 122-24).

Neither Payton nor Dixon testified in his own behalf and both rested without presenting any evidence (Tr. 128-31).

STATUTES AND RULES INVOLVED

Title 22, District of Columbia Code, Section 2201, provides:

> Whoever shall feloniously take and carry away anything of value of the amount or value of $100 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years.

Title 23, District of Columbia Code, Section 306(c), provides:

> Arrests without a warrant, and searches of the person and seizures pursuant thereto, may be made for violation of section 22-2202 (petit larceny), by police officers, as in the case of a felony, upon probable cause that the person arrested has in his possession at the time of the arrest, property taken in violation of that section.

Rule 30, Federal Rules of Criminal Procedure, provides in pertinent part:

> * * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *

Rule 52, Federal Rules of Criminal Procedure, provides:

> (a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

SUMMARY OF ARGUMENT

I

The police had ample probable cause to arrest appellant at the time he was placed under arrest, and therefore, all items seized incident to appellant's arrest were properly admitted into evidence. At the time appellant was placed under arrest, the police knew that appellant, who they had observed walking south carrying several clothing-filled bags, had just broken into a delivery truck.

II

The trial court did not commit plain error in failing to *sua sponte* grant a mistrial when Officer Ford explained that the reason he and his partner were patrolling in a private car and dressed in casual clothes was because they were assigned to the tactical force to stop "these larcenies . . . one or two a day . . . [involving] cutting locks on these delivery trucks." Appellant, who knowingly and intelligently refrained from requesting a mistrial at trial, must not be allowed to prevail on appeal or else future defendants will refain from requesting a mistrial and thereby hope that, if the jury convicts them, they will obtain a reversal on appeal and a second chance for acquittal at a second trial with a second jury. In addition, the Government's evidence at trial was overwhelming and appellant presented no defense; and the testimony in question, which consisted of one-half a sentence, was never mentioned again at trial. In light of this, it was

not plain error for the trial court to fail to *sua sponte* grant a mistrial.

III

It was not plain error for the trial court to instruct the jury on the inference from possession of recently stolen property since the Government's evidence showed that appellant was in possession of recently stolen property. The trial court's reading of the indictment was not plain error and the jury could not have inferred from this reading that there had been a stipulation as to the value of the stolen property. It was not plain error for the trial court to instruct the jury that the larcenous intent of the taker must be "to appropriate the stolen property to his own use inconsistent with the property rights of the person from whom it is taken." It was not reversible error for the trial court to refuse to give a lesser included offense instruction on petit larceny since there was no evidence to indicate a value of less than $100.

ARGUMENT

I. The police had ample probable cause to arrest appellant at the time he was placed under arrest, and therefore, all items seized incident to appellant's arrest were properly admitted into evidence.

(P.H. Tr. 9-10; Mot. Tr. 9, 10, 13; Tr. 82)

Appellant contends that "the evidence introduced by the Government was [the] result of a search subsequent to an unlawful arrest and should have been suppressed." [10] We have some problems understanding this contention. First, it is unclear what "evidence" appellant is referring to on appeal; in the District Court appellant's motion to suppress was directed only at the men's clothing seized at the time of his arrest. Second, appellant refers to a "search"; but there is nothing in the record, to our knowledge, which indicates any evidence was obtained as a result of

[10] Brief for Appellant, p. 8.

a "search"; it appears that all items seized by the police at the time of appellant's arrest were observed by the police in plain view prior to appellant's arrest. In any event, it is clear that the police had ample probable cause to arrest appellant at the time he was placed under arrest, and therefore, all items seized incident to appellant's arrest were properly admitted into evidence.

Appellant argues on appeal that he was arrested when he was initially confronted by Officer Buck on 17th Street. We disagree. The temporary detention of appellant by Officer Buck for the purpose of investigating suspicious circumstances was not an arrest. *Rios* v. *United States*, 364 U.S. 253, 261-62 (1960); *Washington* v. *United States*, No. 20,267, D.C. Cir., January 31, 1968, at 7-9; *Allen* v. *United States*, No. 20,955, D.C. Cir., January 25, 1968, at 4-6; *Bailey* v. *United States*, —— U.S. App. D.C. ——, 389 F.2d 305 (1967) (concurring opinion); *Liles* v. *United States*, No. 20,807, D.C. Cir., November 16, 1967; *Brown* v. *United States*, 125 U.S. App. D.C. 43, 46 n.4, 365 F.2d 976, 979 n.4 (1966).[11] Under the circumstances of this case, Officer Buck was clearly justified in asking appellant to return to the Buick with him; such action was reasonable police procedure (P.H. Tr. 9; Mot. Tr. 9, 10, 13).[12]

Once back at the Buick, Officer Buck along with Officer Ford learned that there had been a radio run for "three Negro males in a Buick" who "were observed breaking into a D.C. delivery truck" (Mot. Tr. 9). Appellant and two other Negro males had been just observed by these

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[11] Accord, *Hall* v. *United States*, 236 A.2d 57 (D.C. Ct. App. 1967); *Green* v. *United States*, 234 A.2d 177 (D.C. Ct. App. 1967); *Perry* v. *United States*, 230 A.2d 721 (D.C. Ct. App. 1967); *White* v. *United States*, 222 A.2d 843 (D.C. Ct. App. 1966).

[12] As this Court pointed out in *Dorsey* v. *United States*, 125 U.S. App. D.C. 355, 358, 372 F.2d 928, 931 (1967):

> If policemen are to serve any purpose of detecting and preventing crime by being out on the streets at all, they must be able to take a closer look at challenging situations as they encounter them.

officers getting out of and standing next to a Buick which had stalled; in addition, appellant was observed going into the back seat of the Buick, taking out clothing-filled bags and walking south on 17th Street with these items. The officers also learned from Warren Kenny, an eyewitness to the larceny, that appellant and Dixon had "just broke into that truck on De Sales Street" (Tr. 82). At this time, appellant and Dixon were placed under arrest (P.H. Tr. 9-10; Tr. 82). Clearly, Officers Ford and Buck had reason to believe that appellant had just committed a felony. The arrest therefore was lawful and all items seized pursuant thereto were properly admitted into evidence.

In any event, the police had ample probable cause to arrest appellant at the time Officer Buck confronted appellant on 17th Street. When Officer Buck confronted appellant on 17th Street at the request of Officer Ford,[13] the officers knew the following facts: (1) Within an area of approximately seven blocks there had been an outbreak of daytime larcenies from delivery trucks, (2) A bolt cutter was used in these larcenies, (3) In the afternoon of the day in question, three "shabbily dressed" men (one of which was appellant) were getting out of and standing next to an old Buick with an expired inspection sticker which had stalled out within this seven block area which was in the heart of Washington's professional district, (4) One of these men went into the back seat of the Buick, extracted some clothing-filled bags, walked north on 17th Street and disappeared, (5) Another of these men, appellant, also went into the back seat of the Buick, extracted some clothing-filled bags and walked south on 17th Street, and (6) In the back seat of the Buick in plain view[14] was more clothing-filled bags and a bolt cutter.

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[13] The information which Officer Ford had is imputed to Officer Buck. *Smith* v. *United States*, 123 U.S. App. D.C. 202, 358 F.2d 833 (1966), *cert. denied*, 386 U.S. 1008 (1967).

[14] We take it that there is nothing unconstitutional about the police observing what is in plain view. *Ker* v. *California*, 374 U.S. 23, 43 (1963); *United States* v. *Lee*, 274 U.S. 559, 563 (1927); *Wash-*

In light of these facts, the police had reason to believe that appellant was in the process of escaping from a larceny that he had just committed and that he had the fruits of the crime with him. See 24 D.C. CODE § 306(c) (1967). The fact that Officers Ford and Buck did not know at this time where the larceny had been committed is unimportant. *Norman* v. *United States*, 126 U.S. App. D.C. 387, 379 F.2d 164, *cert. denied*, 389 U.S. 886 (1967); *Jefferson* v. *United States*, 121 U.S. App. D.C. 279, 349 F.2d 714 (1965); *Dixon* v. *United States*, 111 U.S. App. D.C. 305, 296 F.2d 427 (1961); *Robinson* v. *United States*, 109 U.S. App. D.C. 22, 283 F.2d 508 (1960), *cert. denied*, 365 U.S. 830 (1961); *Bell* v. *United States*, 102 U.S. App. D.C. 383, 254 F.2d 82, *cert. denied*, 358 U.S. 885 (1958). What is important is that the police "in the particular circumstances, conditioned by [their] observations and information, and guided by the whole of [their] experience, reasonably could have believed that a crime had been committed by the person to be arrested." *Jackson* v. *United States*, 112 U.S. App. D.C. 260, 262, 302 F.2d 194, 196 (1966). "The problem faced by the officer[s] is one of probabilities—not certainties and not necessarily eventual truth." *Bell* v. *United States*, 102 U.S. App. D.C. 383, 387, 254 F.2d 82, 86, *cert. denied*, 358 U.S. 885 (1958). In the case at bar, the police acted reasonably in believing that appellant had committed a crime and had the fruits of the crime with him.

II. The trial court did not commit plain error in failing to *sua sponte* grant a mistrial.

(Tr. 73)

Appellant contends that the trial court committed plain error in failing to *sua sponte* grant a mistrial when Offi-

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ington v. *United States*, No. 20,267, D.C. Cir., January 31, 1968, at 9; *Harris* v. *United States*, 125 U.S. App. D.C. 231, 370 F.2d 477 (*en banc* 1966), *aff'd*, 36 U.S. L. Week 4195 (U.S. March 5, 1968); *Hiet* v. *United States*, 125 U.S. App. D.C. 338, 339, 372 F.2d 911, 912 (1967).

cer Ford explained that the reason he and his partner were patrolling in a private car and dressed in casual clothes was because they were assigned to the tactical force to stop "these larcenies . . . one or two a day . . . [involving] cutting locks on these delivery trucks" (Tr. 73).[15] We do not think that appellant can honestly claim now that a mistrial should have been granted in light of the fact that he never bothered to request a mistrial at trial. Appellant was aware of this testimony and in fact made an objection to the testimony which was sustained. However, appellant refrained from requesting a mistrial which should be interpreted as a knowingly and intelligently made decision not to ask for a mistrial. If this Court honors appellant's request for mistrial made for the first time on appeal, future defendants will be encouraged to refrain from requesting a mistrial and thereby hope that, if the jury convicts them, they will obtain a reversal on appeal and a second chance for acquittal at a second trial with a second jury. Such a result is unthinkable.

In the instant case, it is especially absurd to think that appellant is now entitled to a mistrial. The Government's evidence at trial overwhelmingly proved appellant guilty beyond a shadow of a doubt and appellant presented no evidence to the contrary. Furthermore, the objected to testimony, which consisted of one-half a sentence, was never mentioned again at trial. In light of these circumstances, there was no need to grant a mistrial and it was not plain error for the trial court to fail to *sua sponte* grant a mistrial. See *Skiskowski* v. *United States*, 81 U.S. App. D.C. 274, 277, 158 F.2d 177, 180 (1946), *cert. denied*, 330 U.S. 822 (1947).[16]

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[15] Brief for Appellant, pp. 6-8.

[16] In addition, we believe that Officer Ford's testimony explaining why he was patrolling in a private car and wearing casual clothes was proper. It was information that the jury was entitled to know. It was information that obviated the need for the jury to speculate. We know of no rule of evidence that requires such explanatory testimony excluded. Officer Ford's testimony certainly did not implicate appellant in any prior criminal activity. Compare *Drew* v. *United States*, 118 U.S. App. D.C. 11, 331 F.2d 85 (1964).

III. The trial court properly instructed the jury.

(Tr. 41, 47-50, 75-76, 100-02, 112-15, 117-19, 149, 154, 159-60, 166-69, 173)

(A)

Appellant contends for the first time on appeal that several of the trial court's instructions were erroneous. Appellant's trial counsel who was in the best position to evaluate the effect of these instructions on the jury did not interpose an objection. Therefore, appellant should be precluded from attaching error to these instructions on appeal since clearly they do not amount to plain error affecting substantial rights of appellant. FED. R. CRIM. P. 30; *Kelly* v. *United States*, 124 U.S. App. D.C. 44, 361 F.2d 61 (1966); *Robertson* v. *United States*, 124 U.S. App. D.C. 309, 364 F.2d 702 (1966); *Williams* v. *United States*, 116 U.S. App. D.C. 131, 321 F.2d 744, *cert. denied*, 375 U.S. 898 (1963); *Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950).

(1) Appellant claims for the first time on appeal that the trial court's instruction on the inference from possession of recently stolen property (Tr. 168-69) was reversible error because the Government did not show that the suit from Bruce Hunt (Government Exhibit 3) and the two suits from Raleigh Haberdasher (Government Exhibit 4) were in appellant's possession and had been stolen.[17] We believe the evidence was clear that the suits from Bruce Hunt and Raleigh Haberdasher had been in appellant's possession and control. These suits were obtained from appellant himself and from the back seat of the Buick which was an area over which appellant had control and from which appellant had obtained the clothing he was carrying down 17th Street (Tr. 75-76, 100-02). In addition, we believe the evidence was clear that the suits from Bruce Hunt and Raleigh Haberdasher were stolen from Thomas' truck. Thomas testified that these suits from Bruce Hunt and Raleigh Haberdasher, which

[17] Brief for Appellant, pp. 11-13.

the police obtained from Payton and Dixon, had been on his truck just prior to the larceny (Tr. 47-50).

(2) Appellant contends for the first time on appeal that the trial court's instruction which reads as follows:

> On or about February 23, 1967, within the District of Columbia, that the defendant Dixon and the defendant Payton stole property in the possession of Washington Deliveries, Inc., a body corporate—which has been stipulated to—of the value of about $445.00, consisting of clothing of the value of about $445.00 (Tr. 166-67),

was reversible error because the jury may have thought that there had been a stipulation to the question of value.[18] In light of the fact that there was only one stipulation at trial, which involved the corporate existence in the District of Columbia of Washington Deliveries, Inc., and that both Government and defense argued about the value of the stolen property in closing argument, we do not think that the jury could have inferred that there had been a stipulation as to the value of the stolen property (Tr. 41, 149, 154, 159-60). In any event, the jury certainly could not have found the value of the stolen property to have been less than $100 since all the evidence presented at trial was that the stolen property had a value of more than $100; there was no evidence that the stolen property had a value of less than $100.

(3) Appellant contends for the first time on appeal that the trial court's larcenous intent instruction which reads as follows:

> The Court's instructs the jury that grand larceny is defined in the District of Columbia Code as follows:
>
> > "Whoever shall feloniously take and carry away anything of value of the amount or value of $100 or upward . . ." will be punished as the law provides.
>
> The words in the statute that I have just read to you, that they have feloniously taken and carried

[18] Brief for Appellant, p. 15.

> away, means that the property must have been taken unlawfully from the possession of another with the fraudulent intent to convert the same to the use of the person taking the property. In order to constitute grand larceny, the taking of the property must be accompanied with intent to steal it. The intent of the taker must be to appropriate the stolen property to his own use inconsistent with the property rights of the person from whom it is taken. * * * (Tr. 167),

was reversible error because the court "neither used the phrase 'felonious taking' nor 'with the intent to *permanently* deprive the owner of possession.' " [19] (Emphasis added.) To begin with, the instruction on larcenous intent that appellant requested the trial judge to give did not include the use of the phrases "felonious taking" or "with the intent to *permanently* deprive the owner of possession." [20] (Emphasis added.) Next, we note that the trial court in its instruction did use the phrase "feloniously taken" (Tr. 167).

The instruction on larcenous intent which appellant requested and which is taken from *Criminal Jury Instruction No. 73*, Junior Bar Section of D.C. Bar Ass'n (1966) reads as follows:

> * * * It is thus essential to the offense that, at the time of the taking and carrying the property away, the defendant have had the specific intent to deprive the complainant of his property, and to convert and appropriate it to the use and benefit of the taker.

We see no difference between that instruction and the one the trial court gave:

> * * * The intent of the taker must be to appropriate the stolen property to his own use inconsistent with the property rights of the person from whom it is taken (Tr. 167).

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[19] Brief for Appellant, p. 18.

[20] See Defendant's Request For Instruction filed in the District Court on October 20, 1967.

The larcenous intent instruction given by the trial court in the case at bar was recently approved by this Court in *Mitchell* v. *United States*, No. 20,803, D.C. Cir., March 18, 1968. In addition, this Court in *Mitchell* specifically "reject[ed] . . . [the] contention that larceny requires an intent to appropriate property *permanently*." *Id.* at 7. (Emphasis added.)

(B)

Appellant also contends that the trial court committed reversible error in refusing to instruct the jury on the lesser included offense of petit larceny (Tr. 173).[21] We believe, as did the trial court, that there was no evidence adduced which questioned the grand larceny value of the stolen clothes. A lesser included offense instruction should not be given where the factual element in the greater offense which is not a requisite for conviction of the lesser included offense is not in dispute. See *Sansone* v. *United States*, 380 U.S. 343 (1965); *Berra* v. *United States*, 351 U.S. 131 (1956); *Sparf* v. *United States*, 156 U.S. 51 (1895); *Broughman* v. *United States*, 124 U.S. App. D.C. 54, 361 F.2d 71 (1966).

The Government's evidence showed that the aggregate cost of the one suit (Government Exhibit 3) to Bruce Hunt and the two suits (Government Exhibit 4) to Raleigh Haberdasher was $141.58 (Tr. 112-15, 117-19). This value of $141.58 represents what it would cost Bruce Hunt and Raleigh Haberdasher *to replace* the stolen suits.[22] This is obviously the minimum value that could be placed on the suits. No evidence was presented by appellant to show that the value of the suits was less than $100 or that the suits could be replaced for less than $141.58. Thus, in the words of this Court in *Chew* v. *United States*, 112 U.S. App. D.C. 6, 6-7, 298 F.2d 334,

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[21] Brief for Appellant, pp. 14-17.

[22] The value of the suits in the retail market would, of course, be much higher.

334-35 (1962), "It was unnecessary to instruct on petit larceny because there was nothing in the evidence to indicate a value of less than $100." *Cf. Burcham* v. *United States*, 82 U.S. App. D.C. 283, 163 F.2d 761 (1947).

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21530
(Cr. No. 540-67)

LEROY PAYTON

Appellant

vs.

UNITED STATES OF AMERICA

Appellee

Appeal from the United States District Court
for the District of Columbia

THOMAS M. O'MALLEY

1625 K Street, N.W.
Washington, D.C. 20006

Attorney for Appellant

Appointed by this Court

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21539

LEROY PAYTON

Appellant

vs.

UNITED STATES OF AMERICA

Appellee

Appeal from the United States District Court
for the District of Columbia

REPLY BRIEF FOR APPELLANT

The appellant in reply to Appellant's Brief states as follows:

In "Questions Presented", Question (1) of Appellee's brief is misstated in that the arrest occurred prior to the time any knowledge was received by the arresting officers that the appellant and others had broken into a delivery truck.

- - - - -

Appellee's brief needlessly and hopelessly confuses and obfuscates the issue of the lawfulness of the

arrest and the validity of the search by intermingling facts presented at both a pre-trial hearing before Curran, C. J. on August 14, 1967 and a subsequent hearing on the motion to suppress heard by the trial judge.

The appeal is from a ruling by the trial judge and therefore only those facts can be considered on appeal which were presented to that trial judge.

The pertinent facts relevant to the trial judge's ruling on the motion to suppress are as recited on pages 3 and 4 of Appellant's brief.

Appellee's argument II suggests that it was not plain error for the Court not to sua sponte grant a mis-trial when the police officer in the presence of the jury states: "these larcenies * * * one or two a day * * * (involving) cutting locks on these delivery trucks." even though objection was made and sustained by the Court.

Their argument is that it is not prejudicial because it was only "one half a sentence". One would infer that it should have not influenced a jury of laymen into believing that the appellant had in fact committed those other larcenies for which he was not being tried.

Appellee's argument is not in good faith for at page two of their brief relating to the pretrial motion to suppress, in their argument to the pre-trial judge they say: "Officer Ford was aware that there had been about ten recent daytime larcenies from trucks where a bolt

cutter had been used to break into the trucks (Mot.Tr.7)."

The appellee would have the Court in the pre-trial motion believe that this defendant had committed these other ten crimes but when the same facts are presented to a jury of laymen the appellee would have this Court believe that they could not logically have been so influenced.

Appellant's contention is that if Officer Ford's testimony about prior larcenies should not have been prejudicial when heard by the jury then it should have no persuasive force with the Court when considering the question of "probable cause to arrest".

In argument 3 A. (1) Appellee contends that the instruction on "recent possession" was proper. They contend "These suits (Government exhibits 3 and 4) were obtained from appellant himself and from the back seat of the Buick which was an area over which appellant had control and from which appellant had obtained the clothing he was carrying down 17th Street (Tr. 75-76, 100-02)."

On pages 75 and 76 Officer Ford testified that the Appellant was one of the persons he saw taking clothing from the back of the car; on pages 100-102 the officer identified Government exhibit 3 as "some of the clothes that we took from the automobile and took from Mr. Payton. I don't know if the other clothing has been released. There was more than that though." and Government

Exhibit 4 "These are more of the clothes that was taken from the crime."

We submit on this record that the basic fact of exclusive possession and control was not established.

Nor were exhibits 3 and 4 proven to have been stolen. The Appellee states "Thomas testified that these suits from Bruce Hunt and Raleigh Haberdasher, which the police obtained from Payton and Dixon, had been on his truck just prior to the larceny (Tr. 47-50). On those pages Mr. Thomas merely says that exhibits 3 and 4 were on his truck that day. Mr. Thomas does not say in testimony that anyone took anything off of his truck without permission or consent.

Appellee's argument III B addressed itself to Appellant's argument that the court erred in failing to give, when requested, an instruction on the lesser included offense of "petit larceny". Exhibit 3 had a value of $41.42 and Exhibit 4 had a value (two suits) of $100.16. If the jury believed on this confused record a larceny of either and not both of the exhibits in one instance the Court could not have instructed on Grand Larceny and in the other event the line of demarcation would be a mere eighteen cents.

The Appellee, in supporting it's proposition of the law, misstates the law of Chew v. United States, 112 U.S. App. D.C. 6, 6-7, 298 F.2d 334, 334-335 (1962)

"It was unnecessary to instruct on petit larceny ... because there was nothing in the evidence to indicate a value of less than $100". The next and last sentence of the opinion stated: "Morecver, such an instruction was not requested and no objection to its omission was made." The instant case is therefore distinquished as an instruction was requested.

Respectfully submitted,

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